

88-23

No. _____

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

v.

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and
LISA KLINGHOFFER, as Co-Executrixes of the Estate of
LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEY-
MOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVE-
LYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE,
CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB,
CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB
ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC.,
d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and
CLUB ABC TOURS, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RAYMOND A. CONNELL
29 Broadway
New York, New York 10006
(212) 943-3980
Counsel of Record

JOHN R. GERAGHTY
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980

Of Counsel

QUESTION PRESENTED
FOR REVIEW

Is an order of a United States District Court denying enforcement of a foreign forum selection clause appealable as a collateral final order?

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- * The caption of the case in this Court contains the names of all parties. Petitioner does not have any corporate parent, subsidiary, or affiliate.

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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

v.

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrices of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a/ RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States
Court of Appeals for the Second Circuit

officially reported at 844 F.2d 50 (2d Cir. 1988) is printed in the Appendix at 1a-14a. The decision of the United States District Court for the Southern District of New York dictated in open court on October 21, 1987 and entered on October 23, 1987, not officially reported, is printed in the Appendix at 15a-18a.

JURISDICTONAL STATEMENT

The order below sought to be reviewed is dated April 7, 1988. It was entered on April 7, 1988.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATEMENT OF THE CASE

Petitioner Lauro Lines s.r.l. ("Lauro Lines") is the successor by merger to Achille Lauro ed Altri-Gestione

m/n "Achille Lauro" s.n.c. ("ALA") and Societa de Fatto Achille Lauro ed Altri Gestione Armatoriale Nava Noleggiate ("FAL"), partnerships whose offices were located at Via C. Colombo 45, Naples, Italy. ALA owned the Italian-flag ACHILLE LAURO. Since February, 1982 both partnerships were in Italian reorganization proceedings. On July 28, 1986 all members of the Lauro group, including these partnerships, were merged into one company, i.e., Lauro Lines s.r.l. The merger was deemed retroactive to February, 1982.

On September 14, 1984 ALA time chartered the ACHILLE LAURO to a joint venture composed of FAL and Chandris S.A. (Piraeus). The Joint Venture operated the Vessel as a cruise ship. Tickets were sold to passengers in all areas of

the world. Chandris S.A. (Piraeus) was responsible for the United States market. It retained Chandris, Inc. in New York to distribute tickets to interested travel agents, and others.

In October, 1985 the ACHILLE LAURO was hijacked by terrorists while on a cruise in the Mediterranean. The cruise commenced at Genoa, Italy, and it was scheduled to terminate at the port. The ticket held by each passenger contained the following provision.

Art. 31 -- VENUE OF JUDICIAL PROCEEDINGS -All controversies that may arise directly or indirectly in connection with or in relation to this passage contract, must be instituted before the judicial authority in Naples, the jurisdiction of any other authority being expressly renounced and waived

Beginning in November, 1985 certain American passengers (and the representative of a deceased passenger) brought a

series of suits in the United States District Court for the Southern District of New York against Lauro Lines, Chandris, and Crown Travel Service, Inc. ("Crown"). Jurisdiction was based upon diversity of citizenship, 28 U.S.C.A. § 1332, and, the actions were also within the District Court's admiralty jurisdiction. 28 U.S.C.A. § 1333.*

A passenger ticket is a maritime contract. Foster v. Cunard White Star Ltd., 121 F.2d 12 (2d Cir. 1941); Murray v. Cunard S.S. Co., 235 N.Y. 162, 139

* The Chasser action (85 Civ. 9708) (diversity of citizenship); the Klinghoffer action (85 Civ. 9303) (diversity of citizenship and the Death on the High Seas Act, 28 U.S.C. § 761 et seq.); the Saire action (86 Civ. 6332) (diversity of citizenship); the Meskin action (86 Civ. 4657) (no jurisdictional allegation in the Complaint).

N.E. 228 (1923). Therefore, even where jurisdiction of the district court is based upon diversity, it is the general maritime law of the United States as stated by the federal courts that governs the effect and construction of the ticket's terms and conditions, including its forum selection clause. Janson v. Swedish American Line, 185 F.2d 212, 216 (1st Cir. 1950); De Nicola v. Cunard Line, Ltd., 642 F.2d 5, 7 n.2 (1st Cir. 1981); Siegelman v. Cunard White Star, Ltd., 221 F.2d 189 (2d Cir. 1955); Mulvihill v. Furness Withy & Co., 36 F.Supp. 201, 205 (S.D.N.Y. 1955); Caruso v. Italian Line, 184 F.Supp. 862, 863 (S.D.N.Y. 1960); Lubick v. Travel Services, 573 F.Supp. 904, 906 (D.V.I, 1983); see also Lerner v. Karageorgis, 66 N.Y.2d 479, 485-86, 497 N.Y.S.2d 894-95, 488 N.E.2d 824 (1985)

("In maritime cases, state courts must apply Federal law 'to secure a single and uniform body of maritime laws' . . .").

On November 17, 1986 Lauro Lines filed a motion for an order dismissing all actions against it on the grounds of lack of New York in personam jurisdiction, the ticket forum selection clause, and forum non conveniens. Defendants Chandris and Crown joined the motion to dismiss on the basis of the forum clause. Plaintiffs in all actions opposed the motion.

On October 21, 1987 following oral argument, the District Court denied Lauro Line's motion. With respect to the forum selection clause, the District Court stated, in part:

Under the cases the touchstone is whether the ticket reasonably communicates the importance of its contract provisions. In this case, that is a close question. It is one

upon which reasonable jurists, lawyers, and laymen might differ.

App. 17a.

On October 23, 1987 the Order denying enforcement of the forum clause was entered by the District Court.

On November 20, 1987 Lauro Lines filed its Notice of Appeal from that portion of the Order denying enforcement of the foreign forum selection clause. Appellate jurisdiction was invoked under the collateral final order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Chandris and Crown filed similar Notices of Appeal. All cases were consolidated for purposes of the appeal.

On January 29, 1988 plaintiffs filed a motion to dismiss the appeal for want of appellate jurisdiction.

On April 7, 1988 the United States Court of Appeals for the Second Circuit granted the motion for an order dismissing the appeal for lack of appellate jurisdiction. Recognizing a conflict among the circuits on the question, the Second Circuit held orders denying enforcement of a forum selection clause are not appealable as collaterally final orders:

We have not previously considered the applicability of the Cohen doctrine to the denial of a motion to dismiss on the basis of a contractual forum-selection clause. Some of our sister circuits have concluded that such a denial is immediately appealable, see Farmland Industries v. Frazier-Parrott Commodities, 806 F.2d 848, 850-51 (8th Cir. 1986); Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 193-97 (3d Cir.) ("Coastal Steel"), cert. denied, 464 U.S. 938 (1983), while others have concluded that it is not, see Louisiana Ice Cream Distributors v. Carvel Corp., 821 F.2d 1031, 1032-34 (5th Cir. 1987); Rohrer, Hibler & Replogie, Inc. v. Perkins, 728 F.2d 860, 862 (7th Cir.), cert. denied, 469 U.S. 890

1984). We are persuaded that the latter view is correct because we believe the refusal to dismiss on forum selection grounds is not "effectively unreviewable on appeal from a final judgment."

844 F.2d at 53.

REASONS FOR GRANTING
THE WRIT

Rule 17.1(a) of the Supreme Court Rules states that one of the character of reasons considered by the Court in determining whether to exercise its discretion to review by writ of certiorari is:

When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . .

Five Courts of Appeals have considered the question whether an order denying enforcement of a forum selection clause is appealable as a collaterally final order, and they are in conflict.

Appeals are generally restricted to "final decisions of the district courts."

28 U.S.C. § 1291. However, the exceptions permitted by 28 U.S.C. § 1292 for certain interlocutory orders, decrees and judgments, indicates an intention "to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545 (1949).

In Cohen, supra, the Court held appealable an order denying a corporate defendant in a diversity action the benefit of a statute of the forum state requiring defendants in stockholder derivative suits to post security for expenses. It did so, "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require considera-

tion with it." 337 U.S. at 546-47. The Court explained:

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.

337 U.S. at 546.

The United States Court of Appeals for the Third Circuit in Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir.), cert. denied, 464 U.S. 938 (1983), held an order denying enforcement of a foreign forum selection clause appealable as a collaterally final order. The order finally determined the question. 709 F.2d at 195. A "contractual clause selecting either a judicial or an arbitral

forum for the resolution of disputes establishes a legal right which is analytically distinct from the rights being asserted in the dispute to which it is addressed." Id. at 195. It is not subject to effective review on appeal from a final judgment. Id. at 196.

It is now firmly established in the Third Circuit that "orders denying a pre-trial motion to enforce a forum selection clause are reviewable by courts of appeals." General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 355 (3d Cir. 1986) (order of United States District Court for the Virgin Islands denying enforcement of a Maryland forum clause appealable as a collateral order); accord, In re Diaz Contracting, Inc., 817 F.2d 1047 (3d Cir. 1987) (order of United States District

Court for District of New Jersey denying enforcement of New York forum clause appealable as a collateral order).

The United States Court of Appeals for the Seventh Circuit in Rohrer, Hibler & Replogle, Inc. v. Perkins, 728 F.2d 860 (7th Cir. 1984), found an order denying enforcement of a domestic forum selection clause without its appellate jurisdiction. However, the Court indicated the result might be different had the case involved a foreign forum clause:

In contrast to Coastal Steel where the applicable law (English or American) would differ depending on the forum in which the case was tried, the controlling law in the instant case . . . will be the same whether it is tried in the Northern District of Illinois or the Circuit Court of Cook County.

728 F.2d at 864.

A petition for writ of certiorari was filed in Rohrer, supra. The petition was

denied, but Mr. Justice White in a dissent joined by Mr. Justice Blackmun, stated:

There is no meaningful distinction between this case and Coastal Steel. Indeed, the Seventh Circuit recognized as much when it declined even to attempt to distinguish the holding of the Coastal Steel majority. That the forum selection clause in Coastal Steel specified a foreign court while the one at issue here designates a domestic forum is of little moment: in both cases, denying immediate review would simply postpone the decision whether the contract requires litigation in another forum until after a trial on the merits. In neither case is the order more or less meaningfully reviewable on appeal from final judgment than in the other. The conflict created by the Third Circuit's decision in this case is inescapable, and this petition should be granted to resolve it. Accordingly, I dissent from the denial of certiorari.

469 U.S. 890 (1984).

The conflict among the circuits has now expanded.

The United States Court of Appeals for the Eighth Circuit has held an order by a

district court in Missouri denying enforcement of a forum clause calling for resolution of disputes in Cook County, Illinois appealable as a collateral order. Farm-
land Industries, Inc. v. Frazier -
Parrott Commodities, Inc., 806 F.2d 848
 (8th Cir. 1986). The order conclusively determined the disputed question, it was important to the parties "because it conclusively determines in which jurisdiction the suit must be tried," 806 F.2d at 850, and:

From a practical viewpoint the district court's order denying application of the clause will be unreviewable after final judgment. After a final determination is made on the merits it will be too late effectively to review the present order because the contractual right to trial in Illinois will have been lost. Granted, defendants could raise this issue after a final determination on the merits and possibly gain a new trial in Illinois. However, a Missouri trial and appeal is not what was contemplated by the parties

when they signed the contract; what was contemplated is a single trial resolution of disputes in Illinois. Denying defendants immediate appeal of this issue will effectively deprive them of a contractual right.

806 F.2d at 850-51.

The United States Court of Appeals for the Fifth Circuit has indicated an order denying enforcement of a forum selection clause does not qualify as an appealable collaterally final order, Louisiana Ice Cream Distributors v. Carvel Corp., 821 F.2d 1031 (5th Cir. 1987), and the United States Court of Appeals for the Second Circuit in the decision below found an order denying enforcement of a forum clause without its appellate jurisdiction.

Therefore, the order below would qualify as a collaterally final order in the Third and Eighth circuits; it would

not qualify as a collaterally final order in the Second Circuit; since a foreign forum selection clause, not a domestic forum clause, is involved, appellate jurisdiction might be accepted in the Seventh Circuit; and, the probable result in the Fifth Circuit is difficult to ascertain.*

In this very case, while an order of the United States District Court for the Southern District of New York to enforce

* The Fifth Circuit in Louisiana Ice Cream Distributors v. Carvel Corp., 821 F.2d 1031 (5th Cir. 1987) at 1033 n.2 understood the Third Circuit's decision in Nascone v. Spudnuts, Inc., 735 F.2d 763 (3d Cir. 1984) to question Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir.), cert. denied, 464 U.S. 938 (1983). This was not so. See General Engineering Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352 (3d Cir. 1986); In re Diaz Construction Co., Inc., 817 F.2d 1047 (3d Cir. 1987).

the ticket's forum selection clause has been held not appealable as a collaterally final order by the United States Court of Appeals for the Second Circuit, an order of the United States District Court for the District of New Jersey denying enforcement of the identical ticket forum clause in a suit brought other passengers of the ACHILLE LAURO, was deemed within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit, and that Circuit has heard argument on the merits.*

* On April 7, 1986, Mildred Hodes and her husband Frank, passengers on the ACHILLE LAURO, brought suit against Lauro Lines and others in the United States District Court for the District of New Jersey, Docket No. 86-1381 (HAA). By his Report and Recommendation dated May 7, 1987, the Honorable G. Donald Haneke, United States Magistrate, recommended the New Jersey action be dismissed on among other grounds, the ticket forum

Forum selection clauses are widely used in transactions of all sorts, especially those involving parties from different countries. They provide an important substantive right by "limit[ing] all uncertainty as to the nature, location, and outlook of the forum in which [parties of differing nationalities], might find themselves." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 n.15 (1972). Absent some cogent reason for not doing

(footnote continued)

selection clause. By Decision dated December 30, 1987, and Order entered January 4, 1988 the Honorable Harold A. Ackerman, United States District Court Judge for the District of New Jersey, declined enforcement of the forum selection clause. On February 2, 1988 Lauro filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit. On June 22, 1988 argument on the merits was heard by the Third Circuit.

so, this Court has repeatedly indicated they should be enforced. Bremen, supra; Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Stewart Organization, Inc. v. Ricoh Corporation, 56 U.S.L.W. 4659 (U.S. June 20, 1988).

The question of whether orders denying enforcement of forum selection clauses qualify as appealable collaterally final orders has been considered by five circuits. The results are in conflict. As recently stated by Mr. Justice Kennedy in connection with the enforcement of a forum selection clause, "the federal judicial system has a strong interest in the correct resolution of these questions." Stewart, supra, 56 U.S.L.W. at 4662.

Surely, the first step towards the correct resolution of questions concerning the enforcement of forum selection clauses is

to end the ever expanding conflict among the circuits on the question of appellate jurisdiction to hear an immediate appeal from district court orders denying their enforcement.

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Dated: July 1, 1988

Respectfully submitted,

RAYMOND A. CONNELL
Attorney for Petitioner
29 Broadway
New York, New York 10006
(212) 943-3980

JOHN R. GERAGHTY
HEALY & BAILLIE
29 Broadway
New York, New York 10006
(212) 943-3980

Of Counsel

APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term, 1987

(Argued: February 16, 1988 Decided: April 7, 1988)

Docket Nos. 87-9081, -9083, -9085, -9087, -9089, -9091

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOF-
FER and LISA KLINGHOFFER, as Co-Executrixes of the
Estate of LEON and MARILYN KLINGHOFFER, VIOLA
MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN,
PAUL WELTMAN, EVELYN WELTMAN, DONALD E.
SAIRE and ANNA G. SAIRE,

Plaintiffs-Appellees,

—v.—

ACHILLE LAURO LINES, THE LAURO LINES s.r.l.,
FLOTTO ACHILLE, CHANDRIS CRUISE LINES, ABC
TOURS TRAVEL CLUB, S.N.C. ACHILLE LAURO ED
ALTRI-GESTIONE MOTONAVE ACHILLE LAURO IN
AMMINISTRAZIONE STRAORDINARIA, COMMISSARIO
OF THE FLOTA ACHILLE LAURO IN AMMINISTRA-
ZIONE STRAORDINARIA, CHANDRIS (ITALY) INC.,
PORT OF GENOA, ITALY, CLUB ABC TOURS, INC.,
and CROWN TRAVEL SERVICE, INC., d/b/a RONA
TRAVEL and/or CLUB ABC TOURS,

Defendants,

LAURO LINES s.r.l., CHANDRIS CRUISE LINES, CLUB
ABC TOURS, INC., CROWN TRAVEL SERVICE, INC.,
d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and
CLUB ABC TOURS, INC.,

Defendants-Appellants.

Before:

KEARSE and MAHONEY, *Circuit Judges*,
and GLASSER, *District Judge*.*

Motion to dismiss appeals from an interlocutory order
of the United States District Court for the Southern Dis-
trict of New York, Louis L. Stanton, *Judge*, denying mo-
tion of defendant Lauro Lines s.r.l. to dismiss actions on
ground that contract provision required suit to be brought
in Italy.

Motion granted.

MORRIS J. EISEN, P.C., New York, New
York (Arthur M. Luxemborg, New York,
New York), *for Plaintiffs-Appellees*
Sophie Chasser, Anna Schneider, Viola
Meskin, Seymour Meskin, Sylvia Sher-
man, Paul Weltman, and Evelyn Welt-
man.

* Judge of the United States District Court for the Eastern District of
New York, sitting by designation.

WOLF, BLOCK, SCHORR & SOLIS-COHEN,
Philadelphia, Pennsylvania, (Fischer,
Kagan, Ascione & Zaretsky, New York,
New York), *for the Klinghoffer Plain-*
tiffs-Appellees.

WILLIAM P. LARSEN, Jr., New York, New
York, (Newman, Schlau, Fitch & Burns,
P.C., New York, New York), *for the*
Saire Plaintiffs-Appellees.

RAYMOND A. CONNELL, New York, New
York, (Healy & Baillie, New York, New
York), *for Defendant-Appellant Lauro*
Lines s.r.l.

KIRLIN, CAMPBELL & KEATING, New York,
New York (Daniel J. Dougherty, New
York, New York), *for Defendant-*
Appellant Chandris Cruise Lines.

RUBIN, HAY & GOULD, P.C., Framingham,
Massachusetts (Rodney E. Gould,
Framingham, Massachusetts, A. George
Koevary, Parker & Duryee, New York,
New York), *for Defendant-Appellant*
Crown Travel Service, Inc., d/b/a Rona
Travel and/or Club ABC Tours.

KEARSE, *Circuit Judge:*

Defendants Lauro Lines s.r.l. ("Lauro"), *et al.*, appeal
from an interlocutory order of the United States District
Court for the Southern District of New York, Louis L.
Stanton, *Judge*, denying Lauro's motion to dismiss the
present actions on the basis of forum-selection clauses in

the ticket agreements between Lauro, owner of the cruise ship ACHILLE LAURO, and plaintiffs, who were or represent passengers on the ACHILLE LAURO. The clauses provided that any suit by passengers against Lauro was to be brought in Naples, Italy. Plaintiffs have moved to dismiss the appeals for lack of appellate jurisdiction. For the reasons below, we grant the motion.

BACKGROUND

Plaintiffs, citizens and residents of the United States, were passengers, or are the executrices of the estates of persons who were passengers, aboard the ACHILLE LAURO on a Mediterranean cruise in October 1985 when it was hijacked by terrorists of the Palestine Liberation Organization ("PLO"). The passengers were held captive and terrorized by the PLO, and they have brought the present actions, informally consolidated below, to recover damages for physical and psychological injuries and for the wrongful death of Leon Klinghoffer.

Lauro moved to dismiss the actions on several grounds, including the ground that a forum-selection clause in each passenger ticket required plaintiffs to bring these suits in Naples. The district court denied the motion to dismiss. With respect to the forum-selection clause, the court stated that the touchstone for enforceability was "whether the ticket reasonably communicates the importance of its contract provision." Transcript dated October 21, 1987 ("Tr."), at 3. The court described the "cover reference" to the forum clause as "unobtrusive" and noted that the clause itself appeared in "tiny type." *Id.* at 4. Further, the court noted that though the ticket provided that the passenger "'specifically approves'" certain clauses, the forum-selection clause was not among them. *Id.* at 5. In

addition, though there was a place for the passenger's signature at the bottom of the contract, apparently none of the tickets was signed. In sum, while the district court termed the question of adequacy of notice a close one as to which reasonable persons might differ, *id.* at 4, it concluded that "as a whole . . . the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States," *id.* at 5. Accordingly, the court denied the motion to dismiss.

Lauro and two other defendants have appealed the court's refusal to dismiss on the basis of the forum-selection clause. Plaintiffs have moved to dismiss the appeals on the ground that the denial of the motion for dismissal is an interlocutory order that is not appealable under 28 U.S.C. § 1291 (1982). Lauro, which made no effort to have the court's denial on forum-selection grounds certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) (1982), argues that that denial is a final order insofar as it determines where the litigation will be conducted and that it is immediately appealable under § 1291 pursuant to the *Cohen* doctrine, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). We conclude that the order is not appealable and we therefore dismiss the appeals.

DISCUSSION

Section 1291 gives the courts of appeals jurisdiction to review "final decisions" of the district courts. 28 U.S.C. § 1291. The district court's denial of a motion to dismiss, which leaves the controversy pending, is not, technically, a final decision within the meaning of this section. *See, e.g.,*

Catlin v. United States, 324 U.S. 229, 236 (1945). The *Cohen* doctrine, on which Lauro here relies, is a judicially created exception that allows an immediate appeal from certain orders that are collateral to the merits of the litigation and that cannot be reviewed adequately after final judgment. As the Supreme Court has described it,

[t]he collateral order doctrine is a "narrow exception" . . . whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. See *Helstoski v. Meanor*, 442 U.S. 500, 506-508 (1979); *Abney v. United States*, 431 U.S. 651, 660-662 (1977). To fall within the exception, an order must at a minimum satisfy three conditions: It must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgement."

Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430-31 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

The narrowness of the collateral order doctrine reflects judicial deference to Congress's preference against piecemeal appeals, as well as the recognition that judicial efficiency may be promoted by the denial of interim review because some interlocutory orders will have become moot by the time a final judgment is entered, either because the order is modified prior to final judgment, or because the party disadvantaged by the interlocutory order prevails in the action, or for some other reason. See, e.g., *Stringfellow v. Concerned Neighbors In Action*, 107 S. Ct. 1177, 1184 (1987) ("*Stringfellow*"); *Mitchell v. Forsyth*, 472 U.S. 511, 544 (1985) (Brennan, J., concurring in part and

dissenting in part). The Court has made it clear that when an interlocutory order will be reviewable on appeal from a final judgment, the mere fact that ultimately it might appear that an interim reversal would have been more efficient, or that the party against whom the order is entered may have difficulty in persuading the appellate court to reverse after a final judgment, is not a reason to grant immediate review. In *Stringfellow*, for example, a party that had been allowed to intervene in an action on condition, *inter alia*, that it not assert new claims sought to appeal immediately from the imposition of conditions on its intervention. Though it conceded that it would have the right to review of the conditions upon appeal from the final judgment, it argued that the practicalities of complex and protracted litigation would make an appellate court reluctant to vacate the judgment on the basis of an erroneous intervention order. The Court was unpersuaded that this consideration should lead to disregard of the *Cohen* requirement of effective unreviewability on appeal from final judgment. As the Court succinctly stated, in *Richardson-Merrell Inc. v. Koller*, "the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." 472 U.S. at 436.

This Court too has generally been reluctant to apply the *Cohen* doctrine in an expansive fashion, "lest this exception swallow the salutary 'final judgment' rule." *Weight Watchers v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972); see, e.g., *Richardson Greenshields Securities, Inc. v. Lau*, 825 F.2d 647, 651 (2d Cir. 1987); *Carlenstolpe v. Merck & Co.*, 819 F.2d 33, 35-36 (2d Cir. 1987); *United States Tour Operators Ass'n v. Trans World Airlines*, 556 F.2d 126, 128 (2d Cir. 1977). For example, our decisions indicate that this doctrine does not permit

immediate appeals pursuant to § 1291 from orders denying motions to dismiss on grounds of improper venue, see *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 442-44 (2d Cir. 1966), or forum non conveniens, see *Carlenstolpe v. Merck & Co.*, 819 F.2d at 35-36.

We have not previously considered the applicability of the *Cohen* doctrine to the denial of a motion to dismiss on the basis of a contractual forum-selection clause. Some of our sister circuits have concluded that such a denial is immediately appealable, see *Farmland Industries v. Frazier-Parrott Commodities*, 806 F.2d 848, 850-51 (8th Cir. 1986); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 193-97 (3d Cir.) ("*Coastal Steel*"), cert. denied, 464 U.S. 938 (1983), while others have concluded that it is not, see *Louisiana Ice Cream Distributors v. Carvel Corp.*, 821 F.2d 1031, 1032-34 (5th Cir. 1987); *Rohrer, Hibler & Replogle, Inc. v. Perkins*, 728 F.2d 860, 862 (7th Cir.), cert. denied, 469 U.S. 890 (1984). We are persuaded that the latter view is correct because we believe the refusal to dismiss on forum-selection grounds is not "effectively unreviewable on appeal from a final judgment."

The Third Circuit in *Coastal Steel* came to the conclusion that the district court's refusal to enforce a contractual forum-selection clause was unreviewable on appeal from a final judgment because 28 U.S.C. § 2105 (1982) provides that "[t]here shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction." We do not agree that § 2105 makes a refusal to enforce a forum-selection clause unreviewable after final judgment or, if it did have that effect, that it would allow such a refusal to be reviewed at an earlier stage.

If § 2105 were to be taken literally and did preclude review of such denials after final judgment, we would be at a loss to understand how there could properly be interim review any more than review after final judgment, for "no reversal" has a rather categorical flavor. *Coastal Steel's* rationale was that § 2105 could not have been intended to preclude interim review pursuant to the collateral order doctrine because that doctrine had not been devised in 1789 when the first progenitor of § 2105 was adopted. See 709 F.2d at 196. We find this rationale unpersuasive for two reasons. First, if Congress has indeed made a certain type of order immune from review, the courts simply are not free to ignore the congressional limitation. See, e.g., *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976) (order remanding removed action to state court on grounds provided in 28 U.S.C. § 1447(c) (1982) is made unreviewable by *id.* § 1447(d), and thus may not be reviewed). Second, the *Cohen* doctrine, which interprets finality within the meaning of § 1291, is concerned with the timing of review; it assumes reviewability in principle and focuses on the practical difficulties entailed by postponement of review. The doctrine has not, to our knowledge, been used to review at any time an order of a type that Congress has made unreviewable in principle.

Further, assuming that § 2105 applies to forum-selection motions, if the section were taken literally, it would forbid review of even the granting of a motion to dismiss on forum-selection-clause grounds, for that section does not forbid reversals just of *denials* of motions in abatement; it forbids reversals of any nonjurisdictional "ruling" upon a matter in abatement. We have seen no authority supporting the proposition that such a dismissal, which would, of course, be a final decision in the litigation, is unreviewable.

It appears to us, however, that § 2105 is not to be taken literally. Commentators have called it "one of the most commonly ignored provisions of the Judicial Code," noting that its "most important feature . . . is certainly its disuse." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3903, at 412, 413 (1976). This seems an accurate observation, for assuming, as did *Coastal Steel*, 709 F.2d at 196, that "matters in abatement" means any (nonjurisdictional) ground for dismissal that would leave the parties free to pursue the suit in another forum, that category would appear to encompass matters such as motions to dismiss on grounds of improper venue or forum non conveniens; yet both grants and denials of those motions are commonly thought to be reviewable on appeal from final judgment. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (review of grant of forum non conveniens motion); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (same); *In re Air Crash Disaster*, 821 F.2d 1147, 1166-68 (5th Cir. 1987) (en banc) (reviewing denial of motion to dismiss for forum non conveniens), *petition for cert. filed* (U.S. Nov. 6, 1987) (No. 87-750); *Carlenstolpe v. Merck & Co.*, 819 F.2d at 35-36; *Denver & Rio Grande Western Railroad Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967) (review of denial of motion to dismiss for improper venue); *Gill v. United States*, 184 F.2d 49, 50-51 (2d Cir. 1950) (same); *Corke v. Sameiet M.S. Song of Norway*, 572 F.2d 77 (2d Cir. 1978) (reviewing denial of motion to transfer venue); *Central Valley Typographical Union, No. 46 v. McClatchy Newspapers*, 762 F.2d 741, 744-46 (9th Cir. 1985) (reviewing both grant by first district court of a motion to transfer venue and denial by transferee district court of a motion to transfer to a third district).

We see no reason why denial of a motion to dismiss on the basis of a contractual forum-selection clause should be any less subject to correction upon appeal from a final judgment than are denials of motions for dismissal on grounds of improper venue or of forum non conveniens. The Supreme Court has held that a forum-selection clause in a commercial agreement "should control absent a strong showing that it should be set aside." *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); see *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Such a clause thus grants an important right that should be recognized unless the party resisting enforcement shows the clause to be unreasonable. We would think, therefore, that if the district court has erroneously failed to enforce such a clause, its order may be reversed when the judgment is finally appealed.

Perhaps the most pertinent case decided by our Court is *Avis Rent A Car System, Inc. v. Garage Employees Union, Local 272*, 791 F.2d 22 (2d Cir. 1986), an appeal from a final judgment enforcing an arbitration award. The ground of the appeal was that the district court had refused to enforce a contract provision that required arbitrators to be selected in a certain way from among a certain group. Noting that "analogous contractual forum selection clauses are ordinarily binding and enforceable unless the party resisting them . . . shows them to be unreasonable," *id.* at 26, and ruling that no showing of prejudice was required by the party seeking enforcement of the clause, we reversed the judgment enforcing the award entered by the "wrong" arbitrator, and we remanded for entry of an order directing the parties to place their dispute before an arbitrator called for by the contract. Plainly, therefore, in the context of arbitration clauses, which are a type of forum-selection clause, this Court has viewed the

refusal to enforce as a matter that is fully reviewable on appeal from the final judgment.

We reject Lauro's suggestion that the right granted in a forum-selection clause, if enforceable, must be vindicated immediately or it is lost. It is a right to have the binding adjudication of claims occur in a certain forum; it is not a right of the same magnitude as a constitutional right to be free from double jeopardy, *see Abney v. United States*, 431 U.S. at 660-62, or the right to be free of any trial whatever, *see Mitchell v. Forsyth*, 472 U.S. at 530 (qualified governmental immunity); *Helstoski v. Meanor*, 442 U.S. at 506-08 (Speech and Debate immunity). The rights to escape any trial or any further trial are rights that would be lost unless vindicated at a pretrial stage. In contrast, the right to secure adjudication in a particular forum is not lost simply because enforcement is postponed. And, as noted above, the fact that postponing review may entail additional litigation expense has been explicitly rejected by the Supreme Court as a basis for immediate appeal.

Since we conclude that the district court's denial of Lauro's motion to dismiss on the basis of the forum-selection clause in the passenger tickets will be effectively reviewable on appeal from final judgment, we need not decide whether the first two *Cohen* requirements are met. We conclude that the order at issue here is not appealable under the collateral order doctrine.

Our recent decision in *Karl Koch Erecting Co. v. New York Convention Center Development Corp.*, Nos. 87-7306, *et al.*, slip op. 1431, 1434-36 (2d Cir. Feb. 3, 1988), does not suggest a contrary result. In *Karl Koch*, we held, relying on *Pelleport Industries v. Budco Quality Theatres*, 741 F.2d 273, 278 (9th Cir. 1984), that a district court's enforcement of a contractual forum-selection clause, by re-

manding a removed action to state court, was appealable under the *Cohen* doctrine. Unlike a refusal to enforce, with which we are presented here, the *Karl Koch* enforcement finally decided the forum-selection issue in a way that made the decision unreviewable on appeal from the final judgment simply because the litigation was no longer proceeding in federal court.

Finally, we reject Lauro's fall-back suggestion that we have jurisdiction of these appeals under 28 U.S.C. § 1292(a)(1) (1982). That section allows appeals of interlocutory orders that grant or deny (or otherwise deal with) injunctions. We do not regard the denial of a motion to dismiss on forum-selection grounds as the equivalent of the denial of a motion for an injunction within the meaning of § 1292(a)(1). Further, even if such a denial were tantamount to the denial of injunctive relief, we would grant the present motion to dismiss, for the Supreme Court "has made it clear that not all denials of injunctive relief are immediately appealable; a party seeking review also must show that the order will have a " 'serious, perhaps irreparable, consequence,' " and that the order can be "effectually challenged" *only* by immediate appeal.' " *Stringfellow*, 107 S. Ct. at 1184 (quoting *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955))) (emphasis ours). *See also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 56 U.S.L.W. 4243 (U.S. Mar. 22, 1988). Since, for the reasons discussed above, we have concluded that meaningful appellate review of the present order will be available after final judgment, assuming that judgment is adverse to Lauro, § 1292(a)(1) provides no basis for immediate appeal of the present order.

CONCLUSION

We have considered all of Lauro's arguments in support of immediate appealability and have found them to be without merit. The appeals are dismissed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

85 Civ. 9303

October 21, 1987
12:55 p.m.

LEON KLINGHOFFER, ET AL.,

Plaintiffs,

v.

ACHILLE LAURO, ET AL.,

Defendants.

Before:

HON. LOUIS L. STANTON,

District Judge

DECISION

APPEARANCES

JAY D. FISCHER,
MORRIS EISEN,

Attorney for Plaintiffs

LAWRENCE W. SCHILLING,
RAYMOND A. CONNELL,
DANIEL J. DOUGHERTY,
RODNEY GOULD,

Attorneys for defendants

[2] (In open court)

THE COURT: Thank you, gentlemen. And thank you all for excellent briefs on the points involved in this motion.

They have been expressed in writing and orally with clarity and vigor and style, and admirably cover the great variety of aspects involved.

In ruling on the motion in a somewhat laconic fashion, I do not wish to be taken as disregarding any of the areas presented in the papers or orally, but do so because I feel no jurisprudential purpose would be served by expanding my explanation beyond the points which I regard as decisive.

As to jurisdiction over Lauro, this question arises under New York's Long Arm Statute, which requires a showing of a continuous and systematic course of doing business here such as to warrant a finding of Defendant Lauro's presence in this jurisdiction.

Mere solicitation of business through an agent is not enough, although if solicitation is present, in any substantial degree, very little more is necessary to the conclusion that business is being done.

The argument presented on this motion, since it is common ground that solicitation of business was being done, lies in the fact that Lauro's agent for sales [3] and marketing here was Chandris, Inc., which had authority to confirm some cabins on the Achille Lauro, and which had been at least instrumental in part in obtaining for Crown Travel its authority to confirm other space.

In addition, Chandris, Inc., has been responsible for effecting changes in the Achille Lauro's itinerary, and in some degree to the accommodations of the vessel itself. Chandris, Inc., issued tickets for confirmed space, for money which was received and deposited in an account it maintained for Lauro's name, and Chandris, Inc., also handled at least on various occasions the adjustment of passenger complaints.

There are other activities alluded to, including the volume of passengers which was booked and the amount of money involved, but taken as a whole, those of Chandris, Inc.'s, activities are in themselves sufficient to bring Lauro within the

jurisdiction of this court, and that ground of the motion is rejected.

I turn now to the ticket condition, as it has been referred to, which is directed to Clause 31, and which raises a question over which the courts have enjoyed 90 years of litigation since *The Majestic*.

Under the cases, the touchstone is whether the ticket reasonably communicates the importance of its contract provision.

[4] In this case, that is a close question. It is one upon which reasonable jurists, lawyers, and laymen might differ.

On the one hand, arguing for giving effect to Clause 31, there are the facts that the reference on the cover is clear and noticeable, and preceded by the word in solid capital letters, "IMPORTANT."

The sheet containing what is stated to be the terms and conditions of contract of passage falls out of the ticket in a manner that attracts the passenger's attention to it, and, furthermore, as mentioned in at least one of the cases, there is the sensible understanding, that the passenger must be taken to understand, that these intricate provisions in Italian and English were not printed simply for the fun of it, but had legal meaning which affected the contract of passage.

On the other hand, the cover reference is unobtrusive rather than eye-catching. It merely draws attention to the ship owner's terms and conditions, and does not explicitly state that the ticket represents a contract affecting the passenger's substantial rights.

If its tiny type is read, Clause 31 carries an importance beyond the importance of clauses dealing with short statutes of limitation.

While a statute of limitations clause can be [5] examined after the accident when the importance of the contract as a whole is apparent to all, the effect of Clause 31 is immediately and irrevocably to divest the passenger's right to sue anywhere except before the judicial authority in Naples.

Yet, the contract is at least indirectly ambiguous on that point. For unlike the time limitation Clause 27, Clause 31 is not included in the list of clauses of which the passenger "specifically approves."

Finally, there is a place for the passenger's signature at the bottom of the contract, a provision which as far as appears has been entirely disregarded by both parties to the contract.

On the question, then, as a whole, I find that the ticket does not give fair warning to the American citizen passenger that he or she is renouncing and waiving his or her opportunity to sue in a domestic forum over a contract made and delivered in the United States.

That brings me to the final ground for the motion, the *forum non conveniens* argument, which is raised in a case in which there are in this forum Chandris, Inc., every plaintiff, of whom all are United States citizens, and Crown Travel, and all the initial parties to the suit. The contract was made here and delivered here.

As against that arguing for transfer there are [6] three serious considerations offered. The first is the location of Lauro's crew witnesses. These matters always involve balancing. On balancing their travel here it would not appear to me to impose such a burden as to upset the plaintiff's choice of forum.

The other body of witnesses located in Italy, who have been referred to as the terrorists, do not appear to me to be so important to the issues in this case as to justify its transfer to Naples.

Finally, there is the question of the application of Italian law, and as to the ultimate application of Italian law in this action, I make no ruling at this time.

What issues Italian law might govern is a point as yet somewhat unclear, nor does there appear at this point any particular difficulty in ascertaining or applying Italian law to the extent it may properly be required, and, therefore, I do not find that that factor either separately or in concert with the others justifies transfer under *forum non conveniens*.

Accordingly, the motion is denied, and will be so endorsed for the reasons stated. Thank you very much.